

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 17th day of April, two thousand eight.

PRESENT:

HON. SONIA SOTOMAYOR,
HON. ROBERT A. KATZMANN,
HON. BARRINGTON D. PARKER,
Circuit Judges.

QIAO LIN YANG,
Petitioner,

v.

07-3603-ag
NAC

MICHAEL B. MUKASEY¹, UNITED STATES
ATTORNEY GENERAL,
Respondent.

¹Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Alberto R. Gonzales as the respondent in this case.

1 **FOR PETITIONER:** Theodore N. Cox, New York, New York.

2
3 **FOR RESPONDENT:** Jeffrey S. Bucholtz, Acting
4 Assistant Attorney General, Civil
5 Division, Aviva L. Poczter, Senior
6 Litigation Counsel, Christopher P.
7 McGreal, Trial Attorney, Office of
8 Immigration Litigation, Civil
9 Division, United States Department
10 of Justice, Washington D.C.
11

12 UPON DUE CONSIDERATION of this petition for review of a
13 Board of Immigration Appeals ("BIA") decision, it is hereby
14 ORDERED, ADJUDGED, AND DECREED that the petition for review
15 is DENIED.

16 Petitioner, Qiao Lin Yang, a native and citizen of
17 China, seeks review of an August 3, 2007 order of the BIA
18 affirming the September 27, 2005 decision of Immigration
19 Judge ("IJ") Robert D. Weisel denying petitioner's
20 application for asylum, withholding of removal, and relief
21 under the Convention Against Torture ("CAT"). In re Yang,
22 No. A 98 769 696 (B.I.A. Aug. 3, 2007), aff'g No. A 98 769
23 696 (Immig. Ct. N.Y. City Sept. 27, 2005). We assume the
24 parties' familiarity with the underlying facts and
25 procedural history of the case.

26 When the BIA affirms the IJ's decision but modifies and
27 supplements it, this Court reviews the IJ's decision as
28 modified and supplemented by the BIA decision. Xue Hong
29 Yang v. U.S. Dep't of Justice, 426 F.3d 520, 522 (2d Cir.

2005). This Court reviews the agency's factual findings under the substantial evidence standard, treating them as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); see, e.g., Zhou Yun Zhang v. INS, 386 F.3d 66, 73 & n.7 (2d Cir. 2004), overruled in part on other grounds by Shi Liang Lin v. U.S. Dep't of Justice, 494 F.3d 296, 305 (2d Cir. 2007) (en banc). However, we will vacate and remand for new findings if the agency's reasoning or its fact-finding process was sufficiently flawed. Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391, 406 (2d Cir. 2005). We review de novo questions of law and the application of law to undisputed fact. See, e.g., Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003).

I. Exhaustion and Waiver

____ Under 8 U.S.C. § 1252(d)(1), this Court "may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right." See also, Foster v. INS, 376 F.3d 75, 78 (2d Cir. 2004). While not jurisdictional, this judicially imposed exhaustion requirement is mandatory. Lin Zhong v. U.S. Dep't of Justice, 480 F.3d 104, 119-20 (2d Cir. 2007). Here, Yang failed to assert before the BIA her claim that the IJ erred in not affording her an opportunity to respond

1 to a question about what she feared upon return to China.
2 Therefore, we do not address that claim here.

3 This Court has never held that a petitioner is limited
4 to the "exact contours" of his or her argument to the
5 agency. Gill v. INS, 420 F.3d 82, 86 (2d Cir. 2005). On
6 the contrary, we have held that Section 1252(d)(1) allows us
7 to consider a "specific, subsidiary legal argument[]" or "an
8 extension of [an] argument. . . raised directly before the
9 BIA." Steevenez v. Gonzales, 476 F.3d 114, 117 (2d Cir.
10 2007). Contrary to the government's assertion, Yang's
11 argument regarding the Department of State's 2004 Profile of
12 Asylum Claims and Country Conditions in China (the "2004
13 Profile") did not require exhaustion because the issue was
14 not dispositive. See id at 117-18.

15 However, because Yang has failed to sufficiently argue
16 before this Court that the agency erred in denying CAT
17 relief or in finding that she failed to establish past
18 persecution, we deem any such arguments waived.² See
19 Yueqing Zhang v. Gonzales, 426 F.3d 540, 545 n.7 (2d Cir.
20 2005).

² Contrary to the government's argument, though, Yang did not waive any challenge to the agency's finding that any punishment she might face for violating the family planning policy would not rise to the level of persecution, because she argues that the record indicates that Chinese government officials do carry out forced abortions and sterilizations on occasion.

1 II. Asylum and Withholding of Removal

2 Yang asserts that she established a well-founded fear
3 of future persecution because the 2004 Profile indicates
4 that the family planning policy prohibits unmarried women
5 from having children and indicates that government officials
6 sometimes carry out forced abortions and sterilizations. As
7 Yang argues, the IJ erred in finding that the 2004 profile
8 does not indicate that China's family planning policy
9 applies to single women because it explicitly states that
10 "it is illegal in almost all provinces for a single woman to
11 bear a child." Nonetheless, the record supports the
12 agency's finding that Yang failed to establish a well-
13 founded fear of persecution. The IJ properly found that the
14 2004 Profile does not indicate that Chinese officials
15 forcibly abort or sterilize single women for having
16 children. In fact, it states that central government policy
17 prohibits the use of physical coercion and that U.S.
18 officials are unaware of any cases in which physical force
19 was used in connection with abortions or sterilizations
20 under the family planning policy. Although, as Yang notes,
21 the 2004 Profile indicates that forced abortions and
22 sterilizations do occasionally occur in rural areas, the IJ
23 did not err in finding that her claim was speculative where

1 no information in the report concerning those incidents
2 indicates that someone in her position - a single mother
3 with one child born in the United States - would be forcibly
4 sterilized upon return to China. See Jian Xing Huang v.
5 INS, 421 F.3d 125, 128-29 (2d Cir. 2005).

6 Therefore, the agency properly denied asylum where Yang
7 failed to establish an objectively reasonable fear of
8 persecution. See 8 U.S.C. § 1101(a)(42); Ramsameachire v.
9 Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004). Because Yang
10 was unable to show the objective likelihood of persecution
11 needed to make out an asylum claim, she was necessarily
12 unable to meet the higher standard required to succeed on a
13 claim for withholding of removal. See Paul v. Gonzales, 444
14 F.3d 148, 156 (2d Cir. 2006).

15 For the foregoing reasons, the petition for review is
16 DENIED.

17
18 FOR THE COURT:
19 Catherine O'Hagan Wolfe, Clerk
20

21 By: _____
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